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Maine Labor Relations Board Annual Report, Fiscal Year 1988

Maine Labor Relations Board

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ANNUAL REPORT MAINE LABOR RELATIONS BOARD Fiscal Year 1988

The following report is submitted herewith pursuant to Section 968, paragraph 7, and Section 979-J of Title 26, Maine Revised Statutes.

During the past year, the Maine Labor Relations Board had requests for services in the many areas of responsibility under the various statutes that it administers or under which it has a role. Among the requests were two novel referrals involving the State Panel of Mediators which are briefly discussed later in this report and in the Annual Report of the Panel of Mediators. One of these arose under the Judicial Employees Labor Relations Act and involved the "med/arb" provision of that statute, while the other occurred under recent amendments to the Agricultural Marketing and Bargaining Law which assigned certain mediation functions under that law to the Panel of Mediators. During the fiscal year, there were no legislative initiatives which seriously impacted the jurisdiction or functions of the Board, although a few matters occasioned comment by the Executive Director or staff through appearances at Committee hearings, written submissions or attendance at workshops.

As will be noted later, there were increases in certain of the Board's activities, static trends in others, and declining trends in still others. These variations are reflected in the chart of Board activity over the past nine years at the end of this report.

As in past years, the staff of the Board handled a great many inquiries from public employers and employees or their representatives, the media, members of the public, and others, concerning a variety of issues, questions or simple requests for information. In many instances, these inquiries did not involve collective bargaining at all but related to general employer-employee matters or to personnel issues over which the labor board has no responsibility or role whatever. In the latter situations, the staff does its best to provide some orientation for the inquirer and suggest other agencies or organizations which might be of help. Of course, the staff is a primary source of information for persons interested in the operations and procedures of the public sector labor laws, and staff members extend themselves to be courteous, patient and respon-

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sive to callers or visitors who have concerns directly related to activities of the Board or its associated entities. As in past years, professional staff members participated as panelists, speakers, or were conferees at various seminars or conferences on labor relations. Executive Director Parker Denaco and Mediator Don Ziegenbein appeared on the program and attended the annual conference of the Association of Labor Relations Agencies (ALRA) of which the Board is a member. The 1987 conference of ALRA was held in Albany, New York, in July. In July, 1988, the annual ALRA conference is being held in Seattle and it will be preceded by an intensive three-day academy (ALRAcademy) of recent appointees to labor boards. Two alternate members of the Board are scheduled to attend the ALRAcademy, Alternate Chair Peter T. Dawson and Alternate Employee Representative Vendean V. Vafiades.

In addition to the foregoing, Mr. Denaco participated in a collective bargaining program sponsored by the Maine School Management Association in the fall of 1987 and in a Maine Bar Association-sponsored labor seminar in January, 1988. Board Attorney Marc Ayotte was on a program on collective bargaining in the fall of 1987, held in Worcester, Massachusetts and sponsored by the New England Consortium of State Labor Relations Agencies (NECSLRA). Mr. Denaco also attended the NECSLRA program. The Maine Labor Relations Board is a charter member of NECSLRA which is a principal vehicle for professional training and development for the staff of its member agencies.

Counsel Jacobs and Attorney Ayotte appeared on behalf of the Board in matters that were appealed from Board actions or orders to the Superior Court and Supreme Judicial Court. In the Windham Teachers Association case, the Superior Court affirmed the order of the Board which found the Windham Teachers Association to be in violation of the municipal employees statute when its members engaged in certain "job actions." Counsel Jacobs represented the Board in that case. In Lee Academy, the Superior Court rejected a motion to expand the record as an improper intermediate request for relief. Counsel Jacobs appeared on behalf of the Board in that matter. In State of Maine v. Maine State Employees Association, the Supreme Judicial Court upheld a Superior Court reversal of a Board finding that pension proposals of the employee association were mandatory subjects of bargaining. Attorney Ayotte represented the Board in both proceedings.

While there were no dramatic legislative initiatives during the year affecting the jurisdiction or operation of the labor board, the Second Regular

Session of the 113th Legislature did enact several bills to fund various collective bargaining agreements. Funded were agreements between the Vocational-Technical Institute System and bargaining units represented by the Maine State Employees Association and the Maine Teachers Association, Private & Special Laws, Chapter 100 (March 30, 1988) and Private & Special Laws, Chapter 103 (April 1, 1988) respectively. The Legislature also funded contracts reached between the Judicial Department and representatives of its employees (Chapter 776, Public Laws of 1988). The Legislature also confirmed its intent to raise the per diem of the State Panel of Mediators to \$100.00 per day effective July 1, 1988 (Chapter 786, Public Laws of 1988).

Three other items require special reference in this report. Executive Director Parker A. Denaco, who saw the Board through its formative and maturing years, submitted his resignation which was accepted by the Board in April, 1988. He is expected to pursue a career in private labor arbitration and mediation. Another matter of special note is that the Board and its associated entities are scheduled for Sunset Review by the Legislature in 1988-1989. The Board has submitted its initial report to the Legislature's Committee on Audit and Program Review and Board staff have had an introductory meeting with members of the Committee staff. Board members and staff are looking forward to cooperating with the Committee and Committee staff in the various steps of the process. Lastly, Board staff, particularly Attorney Ayotte, Hearings Reporter Roger Putnam, and Clerk-Stenographer Lorna DeAmaral have been working diligently on the effort to index the decisions of the Board with the goal of making the index available at modest charge to users of the Board's processes and practitioners in public sector labor law. It is expected that the product will be ready for distribution in the fall of 1988. This project was funded by a \$10,000 appropriation of the Legislature during the First Regular Session of the 113th Legislature (Chapter 30, Private and Special Laws, 1987).

The remainder of this report is devoted to a statistical review of the activities of the Board during the fiscal year and comparative statistics from previous years.

BARGAINING UNIT AND ELECTION PROCEDURES

The Board has initiated a new administrative practice which requires public employers to post official Board notices, informing employees of pending unit and election petitions, of the execution of "voluntary agreements" between employers and employee organizations in which a bargaining unit is formed or changed, or when a bargaining agent is recognized by the employer, or both. By so doing, the employees are given the opportunity to raise issues, to participate in the process, or merely to have questions answered. In the past, the Board required a posting for employees' information only when a Board sponsored election had been scheduled. Thus, when a petition for unit determination or an election was filed, or "voluntary agreements" submitted, the Board did not require any special notice to be posted for the information of employees in the affected unit. Under the new practice, posted notice will be required in all instances where any proposed action might affect employee rights under the unit configuration and bargaining representative selection processes of the various public employee statutes.

"Voluntary agreements" are in two forms: 1) An MLRB Form #1, or equivalent, is an agreement between a public employer and an employee organization or union outlining the scope of the bargaining unit, i.e., identifying the positions or job classifications to be included in a bargaining unit, and has nothing to do with the designation or selection of the union or employee organization which will represent the employees in that unit; and 2) an MLRB Form #3, or equivalent, is an agreement between a public employer and a putative or existing bargaining agent in which the agent is voluntarily recognized by the employer as the official representative for the employees in a designated bargaining unit (rather than putting the question to a vote of the employees). It is more common for a public employer to execute a Form #1 than a Form #3, thereby leaving to the employees in a Board-conducted election the determination of whether or not they desire representation. Less commonly an employer will execute both a Form #1 and a Form #3. An employer is not required to agree to either, under the statutes, and may leave the entire process to the Board, through its unit determination hearing and bargaining agent election processes.

During Fiscal Year 1988, the Board received twenty-four (24) voluntary or joint filings on the establishment of, change in, or accretion to collective bargaining units under its jurisdiction. In FY 1987, there were nineteen (19)

such filings and the levels for these two years contrast with nine (9) and ten (10) voluntary unit agreements filed in FY 1984 and FY 1986, and with twenty-nine (29) received in FY 1985. The filings show that in recent years there has been a trend toward organization among certain educational support groups which may not have been the subject of intense organizing efforts in the past, as well as a seeming trend for fire or police supervisory or command personnel to establish distinct bargaining units apart from the rank-and-file, especially in the State's larger towns or cities. Over the years, public security command personnel oftentimes had been joined with the rank-and-file in a single firefighter or police unit and, therefore, have been covered by collective bargaining agreements governing the general unit. The process of "spinning-off" such command units from the larger group may be difficult, where the effort is contested, and requires the determination of a Board hearing examiner through the unit hearing process. The "spin-offs" reported here are those voluntarily agreed to by the parties concerned, being generally the supervisory or command employees themselves, the City or Town administration, and the union or bargaining agent representing the rank-and-file unit. Whether either of the foregoing trends will persist remains to be seen. As noted in the Annual Report for FY 1987, there are relatively few public sector institutional areas remaining, such as hospitals and libraries, which have seen only limited organizational effort in the past or where past organization efforts have had limited success. These also may be the target for more intensive organization in the future.

Although voluntary agreements are sometimes filed initially, typically they are agreed upon after a petition has been filed for unit determination or unit clarification and prior to, or in the course of, a hearing on the outline and scope of the bargaining unit. These petitions either ask the Board to construct a new bargaining unit or to redefine an existing one.

Thirty (30) unit determination or clarification petitions were filed in FY 1988 as of the date statistics were compiled for this report. Twenty-one (21) were Unit Determination petitions (including petitions to intervene in a pending matter) and nine (9) were Unit Clarification petitions. There were fourteen (14) unit filings in FY 1987 and twenty-four (24) in FY 1986. Thus, there has been a clear resurgence of unit filings in FY 1988. Six requests went to hearing; there were two agreements worked out between the parties, with a Board

agent acting as intermediary, which resulted in consent elections. Nine Voluntary Unit Agreements (Form #1) were executed; again, in a number of these, Board staff assisted the parties in reaching agreement.

The Lee Academy matter, which was reported in the FY 1987 Annual Report, was heard by the Board on appeal from a hearing examiner's determination. The hearing examiner had found that Lee Academy constituted a "public employer" as defined in the Municipal Public Employees Labor Relations Act. On appeal to the Board, the ruling was reversed and it was held that the evidentiary record did not sustain a finding in favor of jurisdiction. The Board, therefore, ordered the petition for a unit of professional employees dismissed. The petitioner has appealed the Decision and Order of the Board to the Superior Court for Kennebec County where it is pending.

There remain pending on the docket from prior years thirty-four (34) petitions filed by the State to exclude 550 positions in various state agencies. The parties have requested the Board to postpone additional hearings, after a Board hearing officer resolved approximately 120 of the positions in the Department of Transportation. The parties are to report the results of their efforts in the early part of FY 1989.

After the scope and composition of the bargaining unit is established, either by agreement or hearing and determination, a secret ballot election is conducted by the Board to determine whether the employees wish to be represented by a bargaining agent. During Fiscal Year 1988 there were nine (9) voluntary recognitions filed (Form #3) in which the public employer recognized a bargaining agent without the need for an election. In many of these, a Board official assisted the parties in the discussions leading to agreement. Where the parties do not agree and there is no voluntary recognition, an election is scheduled and, after appropriate notice to the employees, the Executive Director or his designee conducts the election--usually on site--to determine the desires of employees in the bargaining unit. Twenty (20) such requests were filed in FY 1988, of which two were requests to intervene and appear on the ballot. In the Yarmouth School Aides election, the parties agreed to a "Globe" style proceeding whereby the employees voted their preferences regarding the competing organizations and, on a separate ballot, expressed their desires with respect to the configuration of the bargaining unit. The employees' selection of one of the participating unions obviated the need to inspect the second set of ballots.

Among the remaining filings for election, ten elections were held and four petitions were withdrawn or dismissed; others are pending unit hearings or the filing of voluntary agreements. Fourteen (14) such requests were received in FY 1987, twenty-four (24) in FY 1986, and thirty-eight (38) in FY 1985.

In addition to the foregoing certification election requests, the Board received seven (7) requests for decertification/certification, which process involves a challenge by a petitioning organization to unseat an incumbent organization as bargaining agent for the bargaining unit members. ~~Four of these~~ petitions resulted in elections during the year; two were withdrawn or dismissed; one remains to be scheduled.

The Board also processed two (2) straight decertification petitions in FY 1988 in which no "new" union is involved in the election. These petitions do not involve one labor organization seeking to unseat another but are merely attempts by a group of unit employees to remove an incumbent organization as bargaining agent for the employees in the unit. Elections were conducted in each of these matters. In the Hancock County Sheriff's Department decertification election, there was a tie in the number of unchallenged ballots cast; however, there were three challenged ballots, thus leading to an expedited review by the Executive Director as required by the statute. As a result of the expedited review, it was determined that the incumbent failed to receive a majority of the votes cast, resulting in a formal determination that the bargaining agent was decertified.

There were three matters carried over from FY 1987 and elections held at the beginning of FY 1988. Therefore, there were thirty-two (32) election requests in all requiring attention during the fiscal year; this compares with thirty-six (36) in FY 1987 and thirty-one (31) in FY 1986. In all, Board officials conducted nineteen (19) on-site elections pursuant to the various petitions filed. Seven matters were withdrawn or dismissed and the remainder were either awaiting the scheduling of election or awaiting resolution of a unit determination proceeding. Communities and public entities involved ranged from the Aroostook County Sheriff's Department to the Biddeford School Custodians, to the Madawaska Educational Support Staff, and to the Hallowell Police and Public Works Department. A total of twenty-six public entities across the state were involved in Board-held elections during the fiscal year.

DISPUTE RESOLUTION

The Panel of Mediators is the cornerstone of the statutory dispute resolution process as measured by volume of activity and in terms of credibility of the Panel in the client community.

The activities of the Panel of Mediators is summarized for purposes of this report and is more fully reviewed in the Annual Report of the Panel of Mediators submitted this date to the Governor as required by statute. The number of new requests this fiscal year receded to eighty-eight (88), from the ~~record number~~ of one hundred and twenty (120) filed in FY 1987. However, there were forty-eight (48) carry-over matters from the record FY 1987 filings which required mediation activity in FY 1988. Among the filings were three under the Maine Agricultural and Bargaining Law, which was amended in FY 1987 to insert the Panel of Mediators in the contract dispute mechanism between processors and producers who are subject to that statute. Mediator Don Ziegenbein successfully assisted the parties in two negotiations involving Interstate Food Processing Corp. and McCain Foods, Inc. and the council representing their contract producers. The success ratios for the Panel has exceeded 70 percent of matters handled by its members over the past several years. The success rate in FY 1988 reached 82 percent for matters filed in that year which had completed the mediation process; the FY 1988 success ratio matches the previous high achieved in FY 1985. As has been expressed in the reports of recent years and which is reinforced by the experience in FY 1988--and is worthy of repetition--the continuing success of the Panel is undeniable evidence of the extraordinarily high degree of competence and skill demonstrated by its individual members. The cumulative years of experience among Panel members and the talent for creative problem solving possessed by its individual members are critical elements in their effectiveness. The level of expertise and competence represented by Panel members has been acknowledged and praised by users of mediation services on numerous occasions. Although reports in recent years have expressed caution concerning any expectation with respect to continuation of the success levels achieved, the Panel puts this caution to rest in each succeeding year. It is now reasonable to expect that the Panel will achieve a success rate in excess of 70 percent in future years.

Fact-finding is the second step in the three-tiered process of statutory dispute resolution. Beginning in Fiscal Years 1984 and 1985, requests for fact-

finding began declining from the levels of earlier years. In Fiscal Year 1988 there were fifteen (15) fact-finding requests filed.¹ Prior to 1984 fact-finding requests ranged from twenty-eight (28) in FY 1983 to the record level of forty-nine (49) filings in FY 1981. The range in the Fiscal Years 1984 through 1988 has been eleven (11) filings in FY 1985 to nineteen (19) in FY 1986. The reasons for the decline are unclear but it is apparent that the increasing effectiveness of the Panel of Mediators, particularly in the years FY 1985 to the present, is a prominent factor. The decline in fact-finding filings almost parallels the rise in the mediation settlement rate for those years. Matters not resolved in mediation typically go on to fact-finding. Other factors in the decline of fact-finding requests might be the expense of the process, since the fees and expenses of private fact-finding panels are borne by the parties rather than by the State. Another factor, perhaps, is that fact-finders can make findings and recommendations only, and their recommendations have no binding authority under the public sector statutes. Clearly, however, the effectiveness of the mediation process is a major factor in the reduced number of fact-finding requests in recent years.

Five fact-findings went to actual hearing and report in FY 1988. Three requests were pending assignment for hearing at year's end. The others were dismissed or withdrawn, in most cases because the parties settled their disputes prior to fact-finding.

Interest arbitration is the third and final step in the statutory dispute resolution process. Under the provisions of the various public employee statutes administered by the Board, an interest arbitration award is binding on the parties only as to the non-monetary issues involved in collective bargaining negotiations. Issues involving salaries, pensions and insurance are subject to interest arbitration but an award on these issues is advisory only. In recent years, the Board has received few requests related to interest arbitration. Although the statutes require that all interest arbitration awards, however the arbitrator or arbitration panel is selected, are to be filed with the labor

¹Ten (10) were filed with the Board for appointment of private fact-finding panels by the Executive Director. Five (5) were filed with the Board of Arbitration and Conciliation, which requires a joint submission of the parties. When the services of the State Board of Arbitration and Conciliation are utilized, the statutory per diem and expenses of the Board members are defrayed by the State.

board, in FY 1988 no such awards were filed. It is assumed, therefore, that no interest arbitration awards were issued in the public sector during the year, although it may be that parties have failed to file awards in the few instances where arbitration might have taken place. During the year, one request was received by the Board of Arbitration and Conciliation for interest arbitration, but since it was not a joint request, as required by law, the matter was not processed further.

PROHIBITED PRACTICES

The third area of the Board's responsibilities involves hearing and deciding prohibited practice complaints. These matters are heard before the full Board at formal hearings. Seventeen (17) such complaints were filed with the Board in FY 1988. This is part of a trend which has been observed over the past several years of a steady reduction in the filings of such complaints. A peak was reached in FY 1981 when sixty (60) filings were registered. The figures dropped to thirty-one (31) and thirty (30) in FY 1984 and 1983 respectively and to twenty (20) in FY 1985. There were twenty-five (25) filings in FY 1986--a slight resurgence--and twenty-two (22) in FY 1987.

In addition to the seventeen (17) filings in 1988, there were five (5) carry-over matters from FY 1987. The Board conducted four hearings during the year; in addition to these formal proceedings, a Board member sitting as a single prehearing officer held fifteen (15) prehearing conferences, or attempts to define issues and review evidence and witness lists. In two matters the Board issued formal Decisions and Orders. Several matters were dismissed either by the Executive Director or by the Board for various deficiencies; the Board also granted several Motions to Withdraw. Two matters were deferred to arbitration and formally remain on the docket. Two complaints represented first filings under the Judicial Employees Labor Relations Act since that statute became effective in July, 1984. A unique feature of that statute requires the Executive Director or his designee to investigate a complaint and issue a report and recommend terms of settlement. In the two matters filed against the Judicial Department by the Maine State Employees Association, Board Attorney Ayotte, as designee of the Executive Director, examined witnesses, received sworn statements and documents and prepared reports of his findings, which were then issued by the Executive Director together with recommended terms of settle-

ment. The matters, which had been consolidated for hearing, were resolved by the parties, in the context of a general settlement of their on-going negotiations, and the complaints were withdrawn as part of the settlement agreement.

Five prohibited practice complaints remain on the Board docket for disposition.

OTHER PROCEEDINGS

Three matters involving unit determinations by hearing examiners or election conduct of Board officials were appealed to the Board. The Board as a body has appellate review functions with respect to reports by hearing examiners in representation proceedings and when a party questions conduct of Board officials in election proceedings. As indicated, the Board has original hearing jurisdiction in prohibited practice cases. One of the unit appeals involved Lee Academy, which is commented upon earlier in this report as well as in the Annual Report for FY 1987. In that matter, the full Board issued a decision overturning a hearing examiner's finding that Lee Academy was a "public employer" and, therefore, subject to the jurisdiction of the Municipal Public Employees Labor Relations Act. As stated earlier, the decision of the Board has been appealed to the Superior Court of Kennebec County, where it is pending. Another matter involves the action of the Acting Executive Director, in ordering an election in School Administrative District #75 (Topsham district) during the 60-day period--so called "insulated period"--prior to the termination date of the collective bargaining agreement between the employer and the incumbent bargaining agent. As a result of that election, the incumbent agent was decertified and the insurgent employee organization was certified. The incumbent agent appealed the determination to hold the election during the "insulated period" to the Board where the matter was heard and is awaiting the filing of briefs, at the time of the compiling of this report. One other representation appeal to the Board was withdrawn.

SUMMARY

This report may be summarized by the following chart which makes comparisons in terms of numerical variations in filings from year to year and the percentile changes reflected by these variations:

	<u>FY</u> <u>1980</u>	<u>FY</u> <u>1981</u>	<u>FY</u> <u>1982</u>	<u>FY</u> <u>1983</u>	<u>FY</u> <u>1984</u>	<u>FY</u> <u>1985</u>	<u>FY</u> <u>1986</u>	<u>FY</u> <u>1987</u>	<u>FY</u> <u>1988</u>
Unit Determination/ Clarification Requests	+64%	-48%	+54%	+72%	-57%	+12.4%	-50%	-53%	+114%
Number filed---	54	28	43	74*	32	36	24	14	30
Agreements on Bargaining Unit (MLRB Form #1)									
Number filed---			34	25	10	29	9	19	24
Voluntary Recognitions (MLRB Form #3)									
Number filed---		16	7	9	7	7	4	4	9
Bargaining Agent Election Requests	+19%	-28.5%	+10%	-31%	-32%	+81%	-58%	-42%	+43%
Number filed---	56	40	45	31	21	38	24	14	20
Decertification Election Requests	-21%	+4%	+10%	+71%	-21%	-28%	+46%	-26%	-40%
Number filed---			14	24	18	13	19	15	9
Mediation Requests	+21%	-15%	unchg.	+14.5%	-24%	+18%	+15.3%	+22.4%	-26.6%
Number filed---	98	83	83	95	72	85	98	120	88
Fact Finding Requests	+12%	+29%	-38%	-6.6%	-43%	-31%	+73%	-5.3%	-16.7%
Number filed---	38	49	30	28	16	11	19	18	15
Prohibited Practice Complaints	-22%	+9%	-41%	-14%	+.03%	-33%	+25%	-12%	-23%
Number filed---	55	60	35	30	31	20	25	22	17

* The FY 1983 figure was swelled by the filing by the State of 34 separate Unit Clarification petitions.

As suggested in the annual reports for recent years, the above comparative review suggests the possibility that the Board has been in a period of stabilization in terms of the overall demand for its services, although in the past few years we have occasionally seen dramatic variations in the demand for particular mediation requests and unit and election filings. Whether the trend toward leveling off of the demand for services is the result of a relative "saturation" of the public sector community in organizational and representation terms or is cyclical and reflective of other factors, such as the economy, is difficult to discern. An increased demand for services has been particularly noticeable in

the activities of both the Panel of Mediators until the modest fall-off in FY 1988 and the State Board of Arbitration and Conciliation, which has seen a dramatic increase in requests for its services in Fiscal Years 1987 and 1988. Reference to the Annual Report for the Board of Arbitration and Conciliation is suggested for a more complete review of its activities during FY 1988. This has placed pressure on the Board's limited staff and resources which have not been expanded since the last position authorization in 1978.

We are pleased to state that the Maine Labor Relations Board, through the processes established in the public sector labor relations statutes, is offering, and will continue to offer, effective and expeditious means for protecting employee rights, insuring compliance with statutory mandates, and settling disputes through the prohibited practice and/or the dispute resolution processes provided under the statutes. Contrary to trends elsewhere in the United States, public sector work stoppages, strikes or "work actions" have occurred only rarely in past years involving any employees covered by any of the labor relations acts administered by the Board. In one recent instance, the Board found that a prohibited activity had occurred in the Windham teachers case. It is apparent that the statutory scheme which is designed to provide a methodology for the peaceful and orderly resolution of labor disputes is working reasonably well. We trust that a substantial part of this success may be attributable to high levels of confidence generated by the Board's clientele, which continues to place increasing reliance on the Board and the skills, competence, dedication, and professionalism of its staff.

Dated at Augusta, Maine, this 1st day of July, 1988.

MAINE LABOR RELATIONS BOARD



Marc P. Ayotte
Acting Executive Director
Maine Labor Relations Board